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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 795

UREY WOODSON, AS ALIEN PROPERTY CUSTODIAN OF the United States, and W. A. Julian, as Treasurer of the United States, petitioners

v.

DEUTSCHE GOLD UND SILBER SCHEIDEANSTALT VORmals Roessler, a Corporation, Frankfurt a/Main, Germany

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Supreme Court of the District of Columbia rendered no opinion. The opinion of the Court of Appeals (R. 106–109) is reported in 68 F. (2d) 391.

JURISDICTION

The decree of the court below was entered November 20, 1933. (R. 109.) The petition for a writ of certiorari was filed February 7, 1934, and was

granted March 19, 1934. (R. 113.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Independent Offices Appropriation Act for 1935 precludes recovery by the respondent, a former enemy alien, of amounts deducted on a percentage basis by the Alien Property Custodian from property seized by him pursuant to the Trading with the Enemy Act, such deductions having been made for the purpose of paying the general or administrative expenses of the Custodian's office.

2. Whether under the statutes in effect prior to the enactment of the Independent Offices Appropriation Act for 1935 the Alien Property Custodian had authority to make the deductions referred to in the first question.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, *infra*, pp. 28–30.

STATEMENT

The respondent brought a bill in equity against the petitioners' predecessors in office in the Supreme Court of the District of Columbia under the Trading with the Enemy Act and the several amendments thereto. The bill of complaint (R. 1–8), as amended (R. 9–13), alleged substantially the following facts:

The respondent is a corporation organized and existing under the laws of Germany. (R. 1:) At the time of the entry of the United States into the late war the respondent owned certain property in the United States, including a large number of shares of stock of three American corporations. (R. 2.) At that time also Holzverkohlungs Industrie Aktiengesellschaft, likewise a German corporation, owned certain property in this country, including shares of stock in an American corporation. (R. 2.) Pursuant to the provisions of the Trading with the Enemy Act, the Alien Property Custodian seized on the books of the various domestic corporations all of the right, title and interest of the respondent and Holzverkohlungs Industrie Aktiengesellschaft in and to the stock mentioned above, as well as other property, and since the date of such seizure has managed and administered the property so seized, together with the proceeds and earnings thereof and additions and accretions thereto, under the provisions of the Trading with the Enemy Act as from time to time amended. (R. 2.)

On or about July 16, 1930, Holzverkohlungs Industrie Aktiengesellschaft was, pursuant to the provisions of German law, merged with the respondent, and following such merger all property held by the Alien Property Custodian in the name of Holzverkohlungs Industrie Aktiengesellschaft was duly transferred on the Custodian's books to the account of the respondent. (R. 2.)

Subsequent to the enactment of the Winslow Act of March 4, 1923, each corporation filed a notice of claim with the Alien Property Custodian and obtained the release of $10,000 principal and income on the remaining property at not exceeding $10,000 per annum. (R. 9.)

After the enactment of the Settlement of War Claims Act of March 10, 1928, the two corporations likewise filed claims under that Act and received 80 percent of the property still held by the Custodian less amounts reserved for income taxes tentatively determined and certain other deductions hereinafter mentioned. (R. 3.)

Prior to the allowance of the claims under the Winslow Act, the Alien Property Custodian had deducted from the property of the two corporations certain amounts to cover fees, costs and commissions alleged to be due to depositaries or other persons for the costs and expenses of collecting, securing and safeguarding the property of the two claimants. (R. 9.) These sums are not involved in the present suit. (R. 9.)

Whenever the Alien Property Custodian released principal or income to either of the corporations under the Winslow Act, he deducted from the money to be released an amount equal to 1 percent on claims allowed and paid during the years 1924 to 1927, inclusive, and 2 percent on claims allowed and paid in 1928. (R. 9, 10.) The amounts so withheld aggregated $1,400. (R. 10.)

Whenever the Custodian released any property under the Settlement of War Claims Act, he withheld an amount equal to 2 percent of the sums thus released. (R. 10.) These amounts, which were deducted at various times during the years 1929 to 1931, inclusive, aggregated $60,346.52. (R. 10.) The Custodian also, when crediting the aliens with interest earned on moneys deposited in the Treasury, deducted 1 percent in respect of interest so earned during the years 1923 to 1927, inclusive, and 2 percent in respect of interest earned in later years. (R. 11.). These amounts aggregated $8,142.31. (R. 11.)

The amounts deducted from principal and income released under the Winslow Act and the Settlement of War Claims Act represented charges for administrative expenses and were deposited by the Custodian either in a special account maintained at the Commercial National Bank of Washington, D.C., or in a special account maintained in the United States Treasury for the credit of the Alien Property Custodian. (R. 12.) Out of said funds the Custodian has at various times withdrawn and is continuing to withdraw money for paying the administrative expenses of his own office and for paying to American, neutral and allied nationals sums due them under the decision of this Court in *Escher* v. *Woods*, 281 U.S. 379. (R. 4, 5.) The deductions from Treasury interest have not, to the respondent's knowledge, been given any designa-

tion except possibly that of "commission." (R. 12.)

The aggregate of the funds on deposit in the special accounts in the Commercial National Bank and the Treasury was, on December 31, 1930, $4,143,573.27. (R. 5.) This balance was less than the aggregate of the amounts deducted and withheld by the Custodian upon the property of all claimants whose claims had been allowed and was insufficient to pay in full all claimants, including the respondent, whose money had been paid into said accounts. (R. 5.) The petitioners do not have available any other funds which could lawfully be used to make up the deficiency in the event it should ultimately be held that the deduction of administration expenses was unauthorized and that the several claimants are entitled to have the money refunded. (R. 5.)

The Alien Property Custodian has not furnished any statement to the respondent showing what, if any, portion of the amounts thus withheld was necessary for securing, protecting or administering the property of the respondent and Holzverkohlungs Industrie Aktiengesellschaft, respectively, and what were the number of hours of work spent by and the rate of compensation paid to those employees of the Custodian who performed any such necessary services. (R. 6, 12.) The Custodian has kept no records showing what portion of said amounts withheld is properly allocable to the ex-

pense of administering the property of the two claimants. (R. 6–7, 12.)

The respondent asked that the petitioners be required to account for all sums withheld on account of administrative expenses and to refund $69,888.83 or such greater amount as might be found due. (R. 12.) It also asked the court to declare the existence of a lien in its favor on the special accounts mentioned above, to enjoin the petitioners from making payments out of said funds to anyone but the respondent, and, if deemed advisable, to appoint a receiver to take charge of the funds. (R. 8, 13.)

The petitioners filed an answer to the amended bill of complaint and also moved that the bill be dismissed as insufficient in law. (R. 14–26.) The Supreme Court of the District of Columbia overruled said motion without prejudice (R. 101), and a special appeal was taken to the Court of Appeals, which affirmed the decree of the lower court.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Alien Property Custodian was without authority to deduct and withhold from the property held by him in the name of the respondent and Holzverkohlungs Industrie Aktiengesellschaft amounts computed on a percentage basis as a charge for the expense of administering such property.

2. In holding that the Alien Property Custodian had authority to deduct and withhold from the

property held by him as aforesaid only the actual cost or expense incurred in administering said property.

3. In holding that the Alien Property Custodian must account to the respondent in detail for the expense of administering said property, showing what part of the amounts deducted and withheld represented the cost of such administration.

4. In holding that the decision of this Court in *Escher* v. *Woods*, 281 U.S. 379, requires the conclusion that the Alien Property Custodian was without authority to make deductions on a percentage basis as aforesaid in respect of property owned by enemy aliens at the time of seizure.

5. In affirming the decree of the Supreme Court of the District of Columbia, denying the motion to dismiss the bill of complaint.

SUMMARY OF ARGUMENT

I

In the Independent Offices Appropriation Act for 1935, passed March 28, 1934, Congress has deprived the courts of jurisdiction to enter a judgment in favor of the respondent. The new provision is valid as a withdrawal of the sovereign's consent to be sued, as an exercise of the complete authority over the property of enemy aliens seized during the war, and as a ratification of the deductions of which the respondent complains.

II

The deductions upon a percentage basis made by the Custodian after the passage of the Independent Offices Appropriation Act for the fiscal year 1929 were authorized by that Act. When the Act was passed Congress was aware that the Custodian had made such deductions since the enactment of the Winslow Act in 1923 and that the Custodian planned to continue the practice in the future. Congress did not disapprove the practice, but on the contrary, when informed that the Custodian's office would support itself from the deductions, made no appropriation, and provided that all expenses of the office should be paid from property in the control of the Custodian.

Deductions made by the Custodian while the Winslow Act was in effect were first brought to the attention of Congress by the Custodian's report for 1925, and were not disapproved. The enactment of the Appropriation Act for 1929 must be considered either an approval or a ratification of the deductions.

The rule that continued administrative construction and practice, known to Congress, is not to be readily overruled is applicable here.

The decision of this Court in *Escher* v. *Woods*, 281 U.S. 379, does not control the case at bar, for that case involved deductions from property mistakenly taken from a friendly alien. Certain

language in the opinion, relied upon by the court below, should be considered in the light of the type of case then presented, and not given the general application accorded to it below.

The respondent may not complain that deductions from principal were not authorized under the Appropriation Act for 1929 since the total deductions made did not equal the interest earned upon the property.

ARGUMENT

I

THE INDEPENDENT OFFICES APPROPRIATION ACT FOR 1935 WITHDRAWS THE CONSENT TO SUIT AND RATIFIES THE MAKING OF THE DEDUCTIONS

A brief résumé of the situation underlying the controversy presented in the instant case will, in our opinion, prove helpful to the Court, and is therefore made at the outset.

The office of the Alien Property Custodian was created by the Trading with the Enemy Act of October 6, 1916, and the Custodian was empowered to receive all money and other property of enemy aliens which might be transferred to him under the Act. (c. 106, Sec. 6, 40 Stat. 411, 415.) With respect to property other than money, the Custodian was vested with all the powers of a common-law trustee and authorized to exercise such powers as though he were the absolute owner, under the direction and supervision of the President. (Sec. 12,

as amended by the Act of March 28, 1918, c. 28, 40 Stat. 459, 460.) Orders of the President authorized the Custodian to pay all reasonable expenses incurred in securing possession of and administering the property out of the property from which the expenses arose. Executive Orders of February 26, 1918, No. 2813, and July 16, 1918, No. 2916. The Custodian accordingly charged property held by him with disbursements actually made to depositaries and the like (see R. 9; Report of Alien Property Custodian, S.Doc. No. 181, 67th Cong., 2d Sess., p. vi), but prior to March, 1923, office expenses of the Custodian and salaries of employees were paid from Congressional appropriations. Report of Alien Property Custodian for 1923, H.Doc. No. 155, 68th Cong., 1st Sess., pp. 2–3.

The Winslow Act of March 4, 1923, c. 285, 42 Stat. 1511, provided for the return to the former owners of part of the sequestered property, and Section 2 thereof amended the Trading with the Enemy Act by adding thereto Section 24 (*infra*, p. 29) authorizing the Custodian to pay the "necessary expenses" incurred in securing and administering the property "out of the money or other property * * * in respect of which such expenses are incurred." After passage of the Winslow Act the Custodian began to make flat-rate deductions for administrative expenses—one per cent from income received, one-fourth of one per cent from principal received in cash, and one per-

cent from property returned under the Winslow Act. Report of Alien Property Custodian for 1925, S.Doc. No. 94, 69th Cong., 1st Sess., p. 10; Report of Alien Property Custodian for 1927, H.Doc. No. 302, 70th Cong., 1st Sess., p. 7; Report of House Committee on Appropriations, H.Rep. No. 293, 70th Cong., 1st Sess., p. 2; R. 9–10. Beginning with November 1, 1927, the office of the Custodian became self-supporting, except for the Custodian's salary, through the retention of two percent of income received and two percent of property returned. Report of Alien Property Custodian for 1927, *supra*, p. 2; Office Order No. 5, October 20, 1927, *infra*, p. 41.[1]

The Settlement of War Claims Act authorized the return of 80 percent of the remaining principal and accrued income to the former owners (Act of March 10, 1928, c. 167, 45 Stat. 254), and the Independent Offices Appropriation Act for 1929 (*infra*, p. 30) provided that all expenses of the Custodian's office should be paid from interest and collections on trust funds and other property under the Custodian's control.

No appropriation has been provided for the Custodian's office since 1928, and all expenses of the office have since been paid out of deductions made

[1] The Custodian has continued the two percent deductions. Reports of Alien Property Custodian for 1928, 1930, 1931, 1932 (H.Doc. No. 369, 70th Cong., 2d Sess., p. 2; H.Doc. No. 200, 71st Cong., 2d Sess., p. 2; H.Doc. No. 25, 72d Cong., 1st Sess. p. 2; H.Doc. No. 425, 72d Cong., 2d Sess., p. 2).

from the property. Reports of Alien Property Custodian for 1931, 1932, *supra,* and 1933 (H.Doc. No. 133, 73d Cong., 2d Sess., p. 3).

Flat-rate deductions were made from the respondent's property returned under the Winslow Act during 1924–1927, from property returned under the Settlement of War Claims Act during 1929–1931, and from interest credited on moneys deposited in the Treasury, earned during 1923–1931. (R. 9–10, 11.)

Since the petition for a writ of certiorari was granted in this case, Congress has passed a law which in our opinion unequivocally disposes of every issue involved in the case. The Independent Offices Appropriation Act for the fiscal year ending June 30, 1935 (Public No. 141), passed over the veto of the President, March 28, 1934 (*infra,* p. 28) contains the following applicable provision:

> No claim shall be filed * * * nor shall any suit be instituted or maintained against the Alien Property Custodian or the Treasurer of the United States, or the United States, under any provisions of law, by any person who was an enemy or ally of enemy as defined in the Trading with the Enemy Act, as amended, * * * nor judgment entered in any such suit heretofore or hereafter instituted, for the recovery of any deduction or deductions, heretofore or hereafter made by the Alien Property Custodian from money or properties, or

> income therefrom, held by him or by the Treasurer of the United States hereunder, for the general or administrative expenses of the office of the Alien Property Custodian, * * *.

There is, we submit, no room for doubt that the statute was intended to deprive courts of jurisdiction to entertain suits of this character or to proceed further with actions already brought for the purpose of recovering deductions made for the general or administrative expenses of the Custodian's office. The instant case is plainly within the class of cases to which the Act was directed. In its bill of complaint the respondent stated that the deductions sought to be recovered, except those made from Treasury interest, represented "administration expenses" or "administrative expense." (R. 12.) While, according to the bill, deductions from Treasury interest were not so designated, it does appear that they, too, were deposited in the special accounts in the Treasury and the Commercial National Bank (R. 12) which were and are still used for paying the administrative expenses of the office and for repaying, pursuant to the decision of this Court in *Escher* v. *Woods*, 281 U.S. 379, amounts previously deducted on account of administrative expenses from the property of American citizens and nonenemy aliens. (R. 4–5.) We do not believe that there is any real dispute as to these facts or that it will be suggested that the recent Act is not applicable to this case.

It may, perhaps, be argued that Congress was without power to bar suits in respect of deductions effected prior to the enactment of the statute or to prohibit the rendition of judgments in cases pending at that time. We submit that there would be no merit to such a contention. A suit against the Custodian is one against the United States. *Banco Mexicano* v. *Deutsche Bank,* 263 U.S. 591, 602–603; *von Bruning* v. *Sutherland,* 29 F. (2d) 631 (App. D.C.). Its purpose is not to impose liability upon the Custodian individually, but to recover property held by him as an agent of the Government.[2] It differs in this respect from a suit against a Collector of Internal Revenue, which, for reasons mainly historical, is regarded as an action against the Collector individually, although in the event of recovery payment is assumed by the United States. Cf. *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 430–431.

The respondent is seeking to recover specific property, or the proceeds thereof, which was lawfully seized by the Custodian at the direction of Congress in the exercise of the war power. The authority of Congress with respect to the disposition of such property is absolute. *United States* v.

[2] It will be observed that in the original bill of complaint the defendants were named both individually and in their official capacities. (R. 1.) On June 28, 1933, the court below granted respondent's motion to substitute the new Custodian and Treasurer, naming them in their official capacities alone. (R. 105.)

Chemical Foundation, Inc., 272 U.S. 1, 11; *White* v. *Mechanics Securities Corp.*, 269 U.S. 283, 300–301. No action to recover sequestered property could be maintained by an enemy alien prior to the passage of the Winslow Act in 1923.[3] That Act amended the Trading with the Enemy Act by authorizing suits in equity under Section 9 (a), which provided that in such suits "the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant." (c. 285, 42 Stat. 1511.) The present action was brought under that section. (R. 7.)

Since the suit is one against the United States and relates to property over the disposition of which the United States has absolute, unqualified control, the consent to be sued may, we submit, be withdrawn at any time, for it is well settled that suit against the sovereign is a matter of grace. *Beers* v. *Arkansas*, 20 How. 527; *De Groot* v. *United States*, 5 Wall. 419, 432; *Sutherland* v. *Norris*, 24 F. (2d) 414 (C.C.A. 3d), certiorari denied, 277

[3] The Treaty of Berlin, proclaimed November 14, 1921 (42 Stat., Pt. 2, 1939, 1943) recognized the complete authority of the United States over the seized property and, incorporating by reference Part X of the Treaty of Versailles, ratified every action taken or to be taken with respect to the property, including the deduction of charges and expenses. The treaty further provided that no German national should bring any action in respect to any act or omission under "the exceptional war measures, laws or regulations of any Allied or Associated Power." (Treaty of Versailles, Part X, Sec. IV, Annex 1–3.)

U.S. 602; *Kogler* v. *Miller*, 288 Fed. 806 (C.C.A. 3d). See also *Chase* v. *United States*, 50 C.Cls. 293, 306–314. The effect of the Independent Offices Appropriation Act for 1935 is to repeal *pro tanto* the statute under which the action was instituted and upon which the jurisdiction of the trial court was based. We submit, therefore, that the decree below should be reversed and the case remanded with directions that it be dismissed for lack of jurisdiction.

Even if the action may not properly be regarded as one against the United States, we still think that the power of Congress to preclude recovery is clear. The ground, if any, for an action against the Custodian individually would be that he retained property of the respondent without authority of law. But since, as we have pointed out, Congress has absolute power with respect to the disposition of enemy property, it could, by ratifying acts theretofore unauthorized, confer upon the Custodian statutory protection against suits founded upon such acts. We submit that the Independent Offices Appropriation Act for 1935 has precisely that effect. The specific reference to deductions of the kind here involved, namely, those which do not exceed 2 percent of income received or property returned, plainly shows that it was the purpose of Congress to authorize the Custodian to continue the practice in the future and to ratify all such deductions made in the past. Where the

power over the subject matter is as complete and unqualified as it is here, such ratification is valid and relates back, giving authority for the deductions as of the time they were made. *United States* v. *Heinszen & Co.*, 206 U.S. 370; *Street* v. *United States*, 133 U.S. 299, 307.

II

EVEN BEFORE THE PASSAGE OF THE INDEPENDENT OFFICES APPROPRIATION ACT FOR 1935 CONGRESS HAD APPROVED AND AUTHORIZED THE PRACTICE OF MAKING DEDUCTIONS FOR ADMINISTRATIVE EXPENSE UPON A PERCENTAGE BASIS

While we think the Independent Offices Appropriation Act for 1935 controls the instant case and compels a reversal of the decision below, yet irrespective of the provisions of that Act, we submit that the deductions were properly made under the statutes previously applicable. As pointed out in Point I of this brief, the authority of Congress over property taken from enemy aliens is complete, and the disposition of the property is governed solely by the laws of Congress. Therefore, if doubt arises as to the propriety of any action of the officer charged by Congress with the handling and ultimate distribution of the property, the answer is to be found in the statutes of the United States. We contend that when the applicable statutes are properly construed, it appears that the Alien Property Custodian was authorized to make the deductions complained of here.

The major portion of the amounts sued for by the respondent were retained by the Alien Property Custodian subsequent to the passage of the Independent Offices Appropriation Act for the fiscal year 1929, and the only question with respect to those amounts is whether that Act authorized the flat-rate deductions which were thereafter made.[4] The Act (*infra*, p. 30) provided that:

> All expenses of the office of the Alien Property Custodian * * * including compensation of the Alien Property Custodian at not to exceed $10,000 per annum; shall be paid from interest and collections on trust funds and other properties under the control of such Custodian.

It will be seen that the Act contained no specific direction in regard to the manner in which the expenses should be allocated to the various funds in the control of the Custodian. But, at the time of the passage of the Act, Congress was aware of the fact that the Custodian had, since the passage of the Winslow Act, regularly followed a practice of making flat-rate deductions, both from moneys received and from property returned under the Winslow Act, and it knew that the Custodian planned to continue the practice in the future.

In the report of the Custodian for 1925 (*infra*, p. 31) Congress was advised that a charge of one

[4] This applies to the deductions of $60,346.52 made from property released under the Settlement of War Claims Act (R. 10), and to part of the claim for $8,142.31 deducted when interest was credited on moneys deposited in the Treasury. (R. 11.)

percent upon all income received had been made between March, 1923, and March, 1925. The report of the Custodian for 1926 (*infra*, p. 35) contained a statement of the revenues of the Custodian's office, which showed that deductions had been made from principal and income returned under the Winslow Act. In the report of the Custodian for 1927 (*infra*, p. 39) Congress was advised that from July 1, 1926, to October 31, 1927, the practice had been to deduct one percent from income received and one-fourth of one percent from principal received, and that from November 1, 1927, to December 31, 1927, a deduction of two percent from income was made. The same report disclosed that when property was returned to claimants, an administrative deduction of one percent was made from July 1, 1926, to October 31, 1927, and two percent from November 1, 1927, to December 31, 1927.[5]

[5] While this report did not reach Congress until two days before the passage of the Independent Offices Appropriation Act for 1929, it appears that the information contained in the report had been presented earlier in the hearings on the bill. See Transcript of Hearings before a sub-committee of the Committee on Appropriations of the House, 70th Cong., 1st Sess., December 13, 1927, pp. 3, 7–8, 10–11, 13–14, *infra*, p. 36). The Custodian filed with the Committee a statement of estimated revenues for future operation of the office which included revenues expected from flat-rate deductions (Idem, pp. 4–5).

In earlier hearings Congressional committees had been informed of the practice of making deductions on a percentage basis. See Transcript of hearings before a subcommittee of the House Ways and Means Committee and a sub-

The report of the Committee on Appropriations with respect to the bill discloses that Congress knew that the deductions had been made for maintenance of the Custodian's office since 1924, and the same report states that the work of the Custodian had become self-sustaining (H.R. No. 293, 70th Cong. 1st Sess., *infra*, p. 38). Moreover, during the debate in the House, Mr. Wood, Chairman of the Appropriations Committee, stated that the Custodian's office had become self-supporting, and Mr. Vinson, a member of the same Committee, gave an accurate summary of the flat-rate deductions that had been made in the past and referred to the change in rate effective as of November 1, 1927, which would apply in the future. See Cong. Rec. 70th Cong., 1st Sess., Vol. 69, Pt. 2, pp. 1745, 1799 (*infra*, p. 40).

We submit that when Congress, having such detailed knowledge of the past and contemplated future practice of the Custodian, passed the Independent Offices Appropriation Bill for 1929, it plainly indicated its approval of the method adopted by the Custodian and authorized its con-

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committee of the House Committee on Interstate and Foreign Commerce, entitled "Return of Alien Property", 69th Cong., 1st Sess., April 1926, pp. 71, 88, 89 (*infra*, p. 31); Transcript of Hearings before House Ways and Means Committee, entitled "Return of Alien Property No. 4", 69th Cong., Interim 1st and 2d Sess., Nov., 1926, pp. 447, 467, 468 (*infra*, p. 33); Transcript of Hearings before a subcommittee of the House Committee on Appropriations, relative to the Independent Offices Appropriation Bill for 1928, 69th Cong., 2d Sess., Dec. 14, 1926, pp. 1, 8 (*infra*, p. 34).

tinuance.[6] The flat-rate deduction method has since been continued to the knowledge of Congress and without disapproval. See Reports of the Alien Property Custodian for 1928, 1930, 1931 and 1932 (H.Doc. 369, 70th Cong. 2d Sess., p. 2; H.Doc. 200, 71st Cong., 2d Sess. p. 2; H.Doc. 25, 72d Cong. 1st Sess., p. 2; H.Doc. 425, 72d Cong., 2d Sess., p. 2).

The lesser portion of the amounts involved in the instant case were deducted before the passage of the Independent Offices Appropriations Act for 1929, and while the Winslow Act was in effect.[7] Deductions were made immediately following the enactment of the Winslow Act and continuously from then on. As has been pointed out above, Congress was advised of the practice, at least as early as the Custodian's report for 1925, and was thoroughly acquainted with the facts in 1928, when the Appropriation Act for 1929 was under consideration. The report of the Committee on Appropriations (*infra*, p. 38) referred to the fact that the Winslow Act authorized the making of cer-

[6] For the first time since the Custodian's office was established the Appropriations Act for 1929 made no appropriation to maintain the office. A list of the appropriations made since 1918 appears in the report of the Appropriations Committee on the 1929 Act, and indicates that Congress had reduced the appropriations radically, beginning with about 1924 when the flat-rate deduction method was begun. H.Rep. No. 293, 70th Cong., 1st Sess., p. 3.

[7] That is, $1400.00 deducted from property returned under the Winslow Act and part of the $8,142.31 deducted when interest was credited upon moneys deposited in the Treasury. (R. 10, 11.)

tain charges, and continued that "as a consequence the cost of the work of this establishment has become self-sustaining." Mr. Wood, Chairman of the Committee, said on the floor of the House that "the present officer in charge of alien property has carried out to the letter the provisions of the Winslow Act in making the office of the Alien Property Custodian self-supporting." (See p. 41, *infra*.) While the Winslow Act in terms merely authorized the Custodian to pay necessary expenses out of the property against which the expenses were incurred, yet the evident approval by Congress of the method adopted by the Custodian shows, we think, either that Congress intended in the Winslow Act to authorize flat-rate deductions, or that Congress ratified the deductions in enacting the Appropriations Act for 1929. We submit that, when, as here, Congress is officially informed of the conduct of an officer, who derives his authority from laws of Congress, and when that conduct is not only not disapproved or changed in later legislation but is made the basis for the omission of an appropriation which would be necessary if the officer had not acted as he did, it cannot reasonably be said that the officer has acted in an unauthorized manner.

With respect to deductions made both before and after 1928 the situation is, in our opinion, not substantially unlike that presented in cases in which administrative construction of and practice under a statute have been accorded great weight in de-

termining the intent of Congress. *Murphy Oil Co.* v. *Burnet*, 287 U.S. 299, 302–303; *Interstate Commerce Commission* v. *New York, New Haven & Hartford Railroad Co.*, 287 U.S. 178, 190; *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 492; *Brewster* v. *Gage*, 280 U.S. 327; *National Lead Co.* v. *United States*, 252 U.S. 140; *Logan* v. *Davis*, 233 U.S. 613, 627. There is here no re-enactment of a statute after administrative construction to demonstrate more clearly Congressional approval of the construction, as in some of the above cases, but the Custodian's practice was known to Congress for some time and was considered when the Appropriations Act for 1929 was passed and the appropriation for the Custodian's office first omitted. We submit that the rule of legislative approval of continued administrative construction and practice, enunciated in the cases above cited, is applicable here.

The court below was of the opinion that the case at bar was controlled by the decision of this Court in *Escher* v. *Woods*, 281 U.S. 379. In that case, citizens of Switzerland, whose property had been mistakenly seized as belonging to an alien enemy, were held entitled to recover flat-rate deductions made by the Custodian for administrative expenses. This Court said in the course of the opinion that there was no authority for "treating the property in the hands of the Custodian as one great trust, to be called on to bear the expenses of admin-

istration, as one homogeneous whole" (p. 384). While this language appears to have application generally to the authority of the Custodian, we submit that its intended scope is found in the discussion which followed in the opinion (p. 384–385):

> But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian is entitled to hold. It would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner whose interests were sacrificed up to the moment of restitution. It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm.

We submit, therefore, that the decision in the *Escher* case, *supra,* is that Congress did not authorize the Custodian to charge for the administration of property which the Trading with the Enemy Act did not authorize to be seized in the first place. The manifestly just result reached in the *Escher* case, where the property should never have been taken from the possession of the owners, does not, we submit, control when the property has been rightfully seized and administrative charges made against it by a method of which Congress had specific knowledge. Congress was under no legal obligation to return any of the seized property and

could authorize any disposition of the property or any part thereof as it might see fit. *United States* v. *Chemical Foundation, Inc., supra,* p. 11. In these circumstances we think the historical legislative material which we have brought to bear upon the authority granted by Congress to the Custodian is of more significance here than in the *Escher* case, *supra.* All of the material we have presented here was not before the Court in that case, and we feel that language in the opinion in that case which was not essential to the decision may now properly be re-examined.

It may be argued that since the Independent Offices Appropriation Act for 1929 directed that expenses be paid "from interest and collections on trust funds and other properties under the control of such Custodian", deductions from principal either when received or when returned to owners were unauthorized. Cf. *Escher* v. *Woods,* 281 U.S. 379, 384. But if Congress did so intend, we should expect to find some comment to that effect during the thorough consideration of the Appropriation Act for 1929, for the Winslow Act contained no such limitation.[8] Furthermore, it appears from tables set out in the respondent's amended bill of complaint that deductions amounting to $69,888.83 were made from property that earned approxi-

[8] The provisions of the Appropriation Act with respect to the office of the Custodian were enacted exactly as recommended by the Committee to the House in the first instance. See H.Rep. No. 293, 70th Cong. 1st Sess., p. 2 (*infra,* p. 39).

mately a million dollars in interest (R. 10–11). There can be, therefore, no complaint that the deductions exceeded interest, and we submit that the circumstances surrounding the enactment negative any intent on the part of Congress to condemn the practice of basing flat-rate deductions on principal.

CONCLUSION

There is no longer jurisdiction in any court to enter a judgment in favor of the respondent. The deductions made from the respondent's property by the Alien Property Custodian were within his authority under the laws of Congress. We submit that the decision of the Court of Appeals should be reversed and the case remanded with directions that the respondent's amended bill of complaint be dismissed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
GEORGE C. SWEENEY,
Assistant Attorney General.
J. J. GREENLEAF,
Special Assistant to the Attorney General.
H. BRIAN HOLLAND,
J. R. FILLMAN,
Attorneys.

APRIL, 1934.

APPENDIX A

STATUTES

The Independent Offices Appropriation Act for the fiscal year 1935 (Public No. 141), passed March 28, 1934, provides, in part, as follows:

> Subsection (a) of section 24 of the Trading with the Enemy Act, as amended, is amended by adding at the end thereof the following:
>
> No claim shall be filed with the Alien Property Custodian or allowed by him or by the President of the United States, nor shall any suit be instituted or maintained against the Alien Property Custodian or the Treasurer of the United States, or the United States, under any provisions of law, by any person who was an enemy or ally of enemy as defined in the Trading with the Enemy Act, as amended, and no allowance of any such claim now pending shall be made, nor judgment entered in any such suit heretofore or hereafter instituted, for the recovery of any deduction or deductions, heretofore or hereafter made by the Alien Property Custodian from money or properties, or income therefrom, held by him or by the Treasurer of the United States hereunder, for the general or administrative expenses of the office of the Alien Property Custodian, which deduction or deductions on the collection of any income do not exceed the sum of 2 per centum of such income or which on the return of any moneys or properties or in-

come therefrom, do not exceed the sum of 2 per centum of the aggregate value thereof at the time or times as nearly as may be, of such deduction or deductions, or, for the recovery of any deduction or deductions heretofore or hereafter made by the Alien Property Custodian from money or properties or income therefrom held by him or by the Treasurer of the United States hereunder, for any and all necessary expenses incurred and actually disbursed by the Alien Property Custodian or by any depositary for him in securing the possession, collection or control of any such money or properties or income therefrom, or in protecting or administering the same, as said general or administrative and other expenses and said aggregate value of returned money or properties or income therefrom have been heretofore or shall be hereafter determined by said Alien Property Custodian.

Section 24 of the Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411, added thereto by Section 2 of the Winslow Act of March 4, 1923, c. 285, 42 Stat. 1511, 1516, provides:

> SEC. 24. The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in

respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act.

The Independent Offices Appropriation Act of May 16, 1928, c. 580, 45 Stat. 573, 574, provides in part:

ALIEN PROPERTY CUSTODIAN

All expenses of the office of the Alien Property Custodian authorized by the Act entitled "An Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, as amended, including compensation of the Alien Property Custodian at not to exceed $10,000 per annum; shall be paid from interest and collections on trust funds and other properties under the control of such Custodian.

APPENDIX B

EXCERPTS FROM REPORTS OF THE ALIEN PROPERTY CUSTODIAN AND LEGISLATIVE MATERIAL

Annual Report of the Alien Property Custodian for 1925 (S.Doc. 94, 69th Cong., 1st Sess., p. 10):

> We have adopted the plan of charging an administrative fee of 1 per cent on the return of income received by this office for the accounts of former enemies. The right to charge this administrative fee has been confirmed by an opinion from the Attorney General. * * * We have deducted a fee of 1 per cent on all income received between March, 1923, and March, 1925.

Hearings before a subcommittee of the Committee on Ways and Means sitting in conjunction with a subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives, entitled " Return of Alien Property ", 69th Cong., 1st Sess., April 1926, relative to H.R. 10820, a Bill to provide inter alia, for the return to German nationals of property held by the Alien Property Custodian (pp. 71, 88, 89):

> STATEMENTS OF HON. HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN, AND SEWALL W. ABBOTT, MANAGING DIRECTOR
>
> * * * * *
>
> Mr. RAYBURN. I have a notation here calling my attention to the fact that since

1921, 1 percent of all the property returned has been retained for the administration of this act.

Mr. SUTHERLAND. Yes; they are now retaining a very small percentage as these cases are adjudicated for administrative expenses and relieving the taxpayers to that extent. That would seem to be the fair way to do it, and not unfair to the trusts, to charge a small and inconsiderable sum for the administration of it. Such a charge is commonly made by trust companies handling properties. We charge much less than they do.

* * * * *

Mr. RAYBURN. Then it is not a fair statement to say that the expenses of the Custodian's office are covered by the appropriations made by Congress?

Mr. SUTHERLAND. No; I said that at the time I read those figures, that some of this expense was from the trusts.

Mr. RAYBURN (interposing). I did not know you stated that.

Mr. GARNER. Let me ask you this question in that connection. I understand that a lot of this property that is included in this three hundred million odd dollars has been returned to American citizens because it was taken originally through mistake—is that correct?

Mr. SUTHERLAND. Yes; there has been some of that.

Mr. GARNER. And you are retaining 1 percent of that property to administer this trust?

Mr. SUTHERLAND. The Department of Justice, I am advised, before I became connected with this office, did retain some sums for the administration.

Mr. OLDFIELD. Did they have authority of law to do that? Was it under the Winslow Act?

Mr. SUTHERLAND. I think an opinion was rendered by the Attorney General, based evidently upon the statutes or the general laws. He rendered an opinion in regard to that matter which seemed to settle it.

Mr. GARNER. Do you mean to say that the Attorney General rendered an opinion that Congress had passed a law——

Mr. SUTHERLAND (interposing): I do not say that, but I say that an opinion was rendered by the Attorney General which permitted this to be done, and it is under that opinion that this office has acted. Upon what they based that opinion, I am unable to say.

Mr. GARNER. Could you get that opinion and put it in the record?

Mr. SUTHERLAND. Yes.

[Then follow copies of the opinions of the Attorney General in which the Custodian was advised that he had authority to exact a commission upon property returned under the Winslow Act (89–94). On page 103 appears a table of receipts and disbursements of the Custodian which shows an account of receipts "derived from claims allowed under the Winslow Act approved Mar. 4, 1923."]

Hearings before the Committee on Ways and Means of the House of Representatives, entitled "Return of Alien Property No. 4, 69th Cong., Interim 1st and 2d Sess., Nov. 1926, (pp. 447, 467, 468):

STATEMENT OF HON. HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN

* * * * *

Mr. GARNER. And you are still appropriating 1 percent, or some portion of the alien property, for the expenses of your office?

Mr. SUTHERLAND. Yes; we still make a deduction of a small percentage to cover the expenses. It does not cover all of the expenses, but a good portion of them. We are constantly reducing the appropriation that is made and covering more and more of the expense in under these sums that are deducted.

Mr. OLDFIELD. Do you deduct as much as 1 percent or more than 1 percent?

Mr. SUTHERLAND. It is 1 percent on claims allowed by our office, and I think we have reduced it on the Department of Justice claims now to a third of 1 percent. That is my recollection, that it is a half or a third of 1 percent on the claims passed by the Department of Justice.

* * * * *

Mr. SUTHERLAND. The attorneys' fees are not paid out of that 1 percent. That 1 percent covers clerk hire and the expense of office administration. The attorneys' fees, of course, are charged directly to the trust, just as a trust company would charge an item of necessary expense to the trust in connection with which it was incurred.

Hearings before a subcommittee of the House Committee on Appropriations, 69th Cong., 2d Sess., Dec. 14, 1926, relative to the Independent Offices Appropriation Bill for 1928 (pp. 1, 8):

STATEMENT OF HON. HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN

* * * * *

Mr. WOOD. Does your report show the total cost of the administration of the Alien Property Custodian's office from its beginning?

Mr. SUTHERLAND. I have here a table which was submitted to the subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Sixty-ninth Congress, page 103. From this table, it appears that the total appropriations have been $4,205,420. Our disbursements from appropriations have been $3,984,462.28. Our receipts from special account have been, to March 31, 1926, $234,698.64; and our disbursements, $224,600.87.

On special account No. 2, our receipts have been $584,242.23. Our disbursements under that account have been $520,791.46.

The receipts in special account are derived from claims allowed and disallowed by the Department of Justice. The receipts in special account No. 2 are derived from claims allowed under the Winslow act, approved March 4, 1923, according to the plan I described awhile ago, by which a small percentage is deducted.

Annual Report of the Alien Property Custodian for 1926, H.Doc. No. 91, 70th Cong., 1st Sess. (p. 18):

	Average per month	Twelve months
Revenues:		
Commissions taken on—		
Receipts of trust funds	$11,111.46	$133,337.54
Property returned under sec. 9	9,014.92	108,179.00
Income returned under sec. 23	6,440.16	77,281.93
Claims allowed by Department of Justice	3,139.10	37,669.18
Deductions for Federal reserve bank safe-keeping	2,933.32	35,199.83
Miscellaneous income, bank interest, etc	588.16	7,058.00
	33,227.12	398,725.48

[There follow in the report (pp. 21–23) three lists of employees of the Custodian's office indicating those whose salaries were paid from Congressional appropriation, those paid from commissions collected from the administration and return of trusts, and those paid from commissions collected from the administration and return of trusts in the alien property division of the Department of Justice.]

"Hearings before a subcommittee of the House Committee on Appropriations, 70th Cong., 1st Sess., Dec. 13, 1927, relative to the Independent Offices Appropriation Bill for 1929 (pp. 3, 13, 14):

STATEMENT OF HON. HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN

* * * * *

I might say, in a general way, that beginning with November 1, we have made the office self-sustaining, so that now the only appropriation that I am asking for is the appropriation for my salary.

REVENUE FROM CHARGES ASSESSED AGAINST CLAIMS

Mr. Wood. I would like you to tell us, Senator, by what means you have succeeded in making your office self-supporting.

Mr. Sutherland. By taking a little larger percentage off of the property handled than we did before; just letting the property in our possession pay these expenses, which I think is only fair. We handle it very economically.

Mr. Wood. What percentage did you take, and how?

Mr. Sutherland. We have been taking on income 1 percent, and on principal cash one-fourth of 1 percent. Under the new plan we will take 2 percent on income. Nothing on receipts of principal, but take 2 percent on principal paid out. Under section 9 we have been making a 1 percent administrative charge. The Federal reserve bank expense for handling is one-fifth of 1 percent. The depositary turnover was $2.50 flat.

* * * * *

APPROPRIATIONS MADE FOR ADMINISTRATIVE EXPENSES

Mr. Vinson. Originally who fixed the rate of the charge of administration?

Mr. Sutherland. That was evolved in the practice of the office. Of course, they had to estimate it roughly in the beginning, but they changed from time to time, and finally fixed it at the lowest amount that would cover the administrative expense.

There was no desire to make any money. It was just a matter of a portion of the expenses being borne in that way.

The congressional appropriations were decreased from year to year after the first couple of years.

* * * * *

Mr. VINSON. I take it, Senator, that the increase in the rate of administrative charge was decided upon by you in an endeavor to collect such a sum of money as would make the whole matter self-sustaining.

Mr. SUTHERLAND. Yes; that was figured out by my accounting officer in connection with the representative of the General Accounting Office. It was figured very closely and accurately in order to reach just the amount necessary.

Mr. VINSON. That was the purpose of the increase?

Mr. SUTHERLAND. Yes. The total cost of the office up to date—that is, congressional appropriations and others—would be $5,550,376.26.

[The transcript (p. 4) contains a table of revenues of the Custodian's office setting forth in detail the deductions referred to in Mr. Sutherland's statement.]

Report of the Appropriations Committee of the House of Representatives relative to the Independent Offices Appropriation Bill, 1929 (H.Rep. No. 293, 70th Cong., 1st Sess., p. 2):

ALIEN PROPERTY CUSTODIAN

For the office of the Alien Property Custodian the committee recommends a change in the language of the paragraph providing for the expenses of this activity. Under the terms of the Winslow Act, the Alien

Property Custodian is authorized and directed to make certain charges in the handling of trust funds and other properties, and as a consequence the cost of the work of this establishment has become self-sustaining. The language recommended by the committee is as follows:

"All expenses of the office of the Alien Property Custodian authorized by the act entitled 'An act to define, regulate, and punish trading with the enemy, and for other purposes,' approved October 6, 1917, as amended, including compensation of the Alien Property Custodian at not to exceed $10,000 per annum, shall be paid from interest and collections on trust funds and other properties under the control of such custodian."

The provisions of the above paragraph limit the maximum compensation of the Alien Property Custodian to $10,000 per annum, which heretofore has been at the rate of $7,500 per annum.

Annual Report of the Alien Property Custodian for 1927 (H.Doc. No. 302, 70th Cong., 1st Sess., p. 2):

Beginning November 1, I instituted an important change in the method of paying the expenses of the office. All the salaries except the custodian's salary from November 1 to December 31, 1927, were paid from the funds in my custody through the retention of a small percentage on the funds handled, as will appear in detail in one of the following tables. By reason of this change a total of $67,634.71 has been turned back into the Treasury as unexpended from appropriations previously made. Since Feb-

ruary 1, 1928, all expenses of every kind and character in connection with administering the funds and property in my custody have been paid from the funds being handled.

[On page 7 of the same report there appears a table showing the rates of commissions taken at various times from July 1, 1926, to December 31, 1927, in connection with the administration of alien property.]

During the course of the debate on the floor of the House relative to the Independent Offices Appropriation Act, 1929, the following statements were made by Mr. Vinson, a member of the Committee on Appropriations, and Mr. Wood, Chairman of the same Committee (Cong. Rec., 70th Cong., 1st Sess., Vol. 69, Pt. 2, pp. 1745, 1799):

Mr. VINSON:

* * * * *

According to the record presented to us, this office, beginning with November 1, was made self-sustaining, which is explanatory of the decrease in the appropriation requested from that which was carried for the current fiscal year. That amount was $98,000. This is made possible by a change in the charges against the property and income in possession of this office. Heretofore the charge has been 1 percent on income and one-fourth of 1 percent on principal cash. Under the new plan the charge would be 2 percent on income; nothing on receipts of principal, but 2 per cent on principal paid out. With this charge written off, Senator Sutherland states that the property will net an interest earning of 3½ percent or more at the time of its return.

* * * * *

Mr. WOOD:

* * * * *

I wish to say in passing that the present officer in charge of alien property has carried out to the letter the provisions of the Winslow Act in making the office of the Alien Property Custodian self-supporting. A reference to the hearings in this matter will show that the office of the Alien Property Custodian has been conducted at far less expense, in proportion to the amount of assets on hand and the responsibilities involved, than at any time heretofore.

OCTOBER 20, 1927.

OFFICE ORDER #5, FOR THE INFORMATION OF THE DIVISION OF AUDITS, ACCOUNTING, AND CLAIMS

Effective November 1, 1927, this office will be operated on a self-sustaining basis, and the charges for administrative expenses will be as follows:

Revenues: For income	2%
Returns:	
Claims Paid, Section 9	2%
Income Payments, Section 23	2%

On claims paid by the Department of Justice and payments of Henkel's interest the charges will remain as heretofore.

The above procedure will eliminate all other charges which have been made under the old system.

C. D. BRAY,
Chief Clerk.

Approved.

HOWARD SUTHERLAND,
Alien Property Custodian.

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